Public Prosecutor v Chong Chai

HIGH COURT (MELAKA) — CRIMINAL TRIAL NO 1–45–1 OF 2004
LOW HOP BING J
9 MARCH 2006

Criminal Law — Murder — Defence — Insanity — Whether accused suffering from delusional disorder at commission of offence —

Criminal Procedure — Defence — Insanity — Accused elected to be silent — Effect of election to remain silent — Whether accused proved insanity at time of offence — Order to be made

The accused was charged with murder of his mother, the deceased. SP1, who was the grandmother of the accused, revealed that the accused had caused the death of the deceased while in some form of trance or madness. The accused had elected to remain silent but the defence called SD1, a specialist psychiatrist as a witness. SD1 concluded that the accused was mentally unsound and was not aware at the material time of the commission of the offence that whatever he was alleged to have done was against the law as the accused had been suffering from delusional disorder. On that evidence, the defence took the position of having discharged the burden of proving on a balance of probabilities that by reason of the delusional disorder there was no mens rea on the part of the accused.

Held, acquitting the accused by reason of unsoundness of mind:

(1) Since the defence had not mounted any serious challenge in the course of cross-examination in relation to the material evidence of the prosecution witnesses, the prosecution had in this case proved that the accused had caused the injuries which resulted in the death of the deceased (see paras 35, 38).

(2) This court was unable to sustain the defence's contention that the prosecution had failed prima facie to prove the accused's intention (see para 46).

(3) After a maximum evaluation at the close of the prosecution's case, the court found that the prosecution had established a prima facie case for the accused to answer. Pursuant to s 180(i) and (iii) of the Criminal Procedure Code ('CPC'), the court called upon the accused to enter on his defence (see para 76).

(4) In the absence of any rebuttal evidence by the prosecution, this court accepted SD1's evidence as an expert under s 45 of the Evidence Act 1950 and found that the accused had established on a balance of probabilities the defence of unsoundness of mind under s 84 of Penal Code in that at the time of

committing the act of causing the injuries which resulted in the death of the deceased, the accused was by reason of unsoundness of mind, incapable of knowing the nature of the act and hence the accused's act had fallen short of the offence contained in the charge. The accused was therefore acquitted (see para 92).

(5) Pursuant to s 347 of the CPC, upon a maximum evaluation of the entire evidence adduced at this trial, the court specifically found that the accused did commit the act with which the accused had been charged (see para 94). Section 348(i) of the CPC required the court to order that the accused be kept in safe custody in such place and manner as this court thinks fit and to report to the Ruler of the State (see para 96).

[Bahasa Malaysia summary

Tertuduh telah dituduh membunuh ibunya, si mati. SP1, nenek tertuduh, mendedahkan bahawa tertuduh telah menyebabkan kematian si mati semasa berada dalam keadaan bersawai atau gila. Tertuduh telah memilih untuk berdiam diri tetapi pihak pembela telah memanggil SD1, seorang pakar psikiatri sebagai saksi. SD1 membuat kesimpulan bahawa tertuduh tidak berfikiran waras dan tidak sedar pada masa material perlakuan kesalahan bahawa apa yang beliau dikatakan telah lakukan adalah melanggar undang-undang kerana tertuduh mengalami gangguan mental. Berdasarkan keterangan tersebut, pihak pembela mengambil langkah melepaskan beban pembuktian atas imbangan kebarangkalian di mana atas alasan gangguan mental itu tidak ada mens rea di pihak tertuduh.

Diputuskan, membebaskan tertuduh atas alasan berfikiran tidak waras:

(1) Memandangkan pihak pembela tidak mencabar dengan serius semasa pemeriksaan balas berkaitan keterangan material saksi-saksi pihak pendakwa, pihak pendakwa dalam kes ini telah membuktikan bahawa tertuduh menyebabkan kecederaan yang telah mengakibatkan kematian si mati (lihat perenggan 35, 38).

(2) Mahkamah ini tidak dapat mengekalkan hujah pihak pendakwa bahawa pihak pendakwa telah gagal secara prima facie untuk membuktikan niat tertuduh (lihat perenggan 46).

(3) Setelah satu penilaian maksimum di penutup kes pihak pendakwa, mahkamah mendapati bahawa pihak pendakwa telah membuktikan satu kes prima facie untuk tertuduh menjawab. Menurut s 180(i) dan (iii) Kanun Tatacara Jenayah ('KTJ'), mahkamah memanggil tertuduh untuk memasuki pembelaan beliau (lihat perenggan 76).

(4) Dengan ketiadaan apa-apa keterangan pematahan oleh pihak pendakwa, mahkamah ini menerima keterangan SD1 sebagai seorang pakar di bawah s 45 Akta Keterangan 1950 dan mendapati bahawa tertuduh telah membuktikan atas imbangan kebarangkalian pembelaan fikiran tidak waras di bahawa s 84 Kanun Keseksaan pada masa perlakuan menyebabkan kecederaan sehingga mengakibatkan kematian si mati, tertuduh adalah oleh sebab berfikiran tidak

waras, tidak mampu mengetahui sifat perlakuan tersebut dan justeru itu perlakuan tertuduh tidak terangkum dalam kesalahan yang terkandung dalam pertuduhan tersebut. Tertuduh oleh itu dibebaskan (lihat perenggan 92).

(5) Menurut s 347 KTJ, setelah satu penilaian maksimum keseluruhan keterangan yang dikemukakan dalam perbicaraan ini, mahkamah dengan khusus mendapati bahawa tertuduh telah melakukan perlakuan yang mana tertuduh telah dituduhkan (lihat perenggan 94). Seksyen 348(i) KTJ menghendaki mahkamah memerintahkan tertuduh ditahan di tempat dan cara yang mahkamah fikirkan sesuai dan menghadap Pemerintah Negeri (lihat perenggan 96).]

Notes

For a case on defence of insanity, see 5(1) *Mallal's Digest* para 1621.

Cases referred to

Adel Muhammed El Dabbah v AG for Palestine [1944] AC 156 (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Chah Siew Kok v PP [1987] 1 CLJ 386 (refd)
Eric Woodford, In Re [1946] MLJ 19 (refd)
Fazal Din v PP [1949] MLJ 123 (refd)
Goh Yoke v PP [1970] 1 MLJ 63 (refd)
Juraimi Husin v PP [1998] 1 MLJ 537 (refd)
Jusoh v PP [1963] MLJ 84 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Ooi Lean Chai v PP [1991] 2 MLJ 552 (refd)
PP v Alang Mat Nasir bin Anjang Talib; PP v Chen Lip [1938] MLJ 153 (refd)
PP v Brahim bin Rais [1999] 1 LNS 263 (refd)
PP v Haji Sudin bin Sube [1994] 2 CLJ 437 (refd)
PP v Ismail bin Ibrahim [1998] 3 MLJ 243 (refd)
PP v Jong Chin Chin [1995] 4 MLJ 300 (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Nageswari [1994] 3 MLJ 463 (refd)
Rex v Lim Kang Chui [1949] MLJ 211 (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116 (refd)
Tan Buck Tee v PP [1961] MLJ 176 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Transport Ministry v Garry [1973] 1 NZLR 120 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Criminal Procedure Code ss 84, 180(i), (ii), (iii), 182A, 347, 348, 399
Criminal Procedure Code (Amendment) Act 1976
Dangerous Drugs Act 1952 ss 2, 39B(1)(a)
Evidence Act 1950 ss 45, 105, 134
Penal Code ss 299, 300, 302

Trade Description Act 1972
Internal Security Act 1960 s 57(1)(b)

Hillary D'Cruz (Khairil Aznan bin Azizi and Shamini Devi Dorasamy with him) (Andrew TS Goh & Khairil) for the accused.

Roziza bte Sidek (Shazreen bte Mohd Hatta with her) (Pejabat Penasihat Undang-Undang, Bahagian Pendakwaan) for the prosecution.

Low Hop Bing J:

THE CHARGE

[1] The charge preferred by the prosecution against the accused reads as follows:

> Bahawa kamu pada 5 Julai 2003 di antara jam 7.00 malam hingga 8.00 malam bertempat di hadapan rumah tidak bernombor Kampung Orang Asli, Bukit Seraya, Selandar di dalam Daerah Jasin, di dalam Negeri Melaka telah melakukan pembunuhan ke atas Mah bte Bentong KP No 600505-05-5584. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 302 Kanun Keseksaan dan boleh dihukum di bawah Kanun yang sama.

[My translation:

> That you on 5 July 2003 between 7pm and 8pm in front of an unnumbered house in the Orang Asli Kampong, Bukit Seraya, Selandar in the district of Jasin, in the state of Melaka did commit murder on one Mah bte Bentong IC No 600505-05-5584 and that you have thereby committed an offence under s 302 of the Penal Code and punishable under the same Code.]

[2] A reference hereinafter to any section is a reference to that section in the Penal Code, unless otherwise stated.

ESSENTIAL ELEMENTS

[3] In order to establish a prima facie case of murder punishable under s 302, it is incumbent upon the prosecution to prove:

(1) the death of the deceased;

(2) the deceased's death was caused by injury or injuries inflicted on the deceased;

(3) the accused had caused the injury or injuries which resulted in the deceased's death; and

(4) the act causing the death was committed with the mens rea under s 300(a), (b), (c) or (d), ie if:

   (a) the act is done with the intention of causing death;

   (b) it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid

(see also *Public Prosecutor v Brahim bin Rais* [1999] 1 LNS 263 per Ian Chin J).

MAXIMUM EVALUATION

[4] The judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 clarified that the duty of a judge sitting alone is to determine at the close of the prosecution's case as a trier of fact whether the prosecution has made out a prima facie case and that he must subject the prosecution evidence to maximum evaluation. This test was affirmed by the Federal Court in a judgment delivered by the same learned judge in *PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (refd) (see also *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 per Augustine Paul JCA (now FCJ) delivering the judgment for the Federal Court).

[5] I shall now subject the prosecution evidence to maximum evaluation.

DEATH OF DECEASED

[6] For the purposes of this judgment, the words 'post-mortem' and 'autopsy' are used interchangeably.

[7] SP1, a female senior citizen aged 73, testified that Mah binti Bentong ('the deceased') was her daughter in law who died on 5 July 2003.

[8] Forensic medical specialist SP2 Dr Sharifah Safoorah has some 13 years experience in this field and has conducted some 1500 post-mortems including complicated murder cases.

[9] On 7 July 2003 at 2.30pm, SP2 who was on duty in Melaka Hospital conducted a post-mortem on the deceased, identity card No 600505-05-5584, a female Orang Asli. The deceased was identified to SP2 by the deceased's brother Udin bin Bentong and the investigating officer ASP Mazlan bin Daud SP8 in the presence of police photographer lance corporal Mohd Azis bin Samsuri. SP2 confirmed that the estimated time of death was about eight to 36 hours prior to 2.30pm on 7 July 2003.

[10] On the evidence, I find that the prosecution has proved the death of the deceased.

INJURIES INFLICTED ON DECEASED

[11] SP2 confirmed in a comprehensive autopsy report that rigor mortis was established and hypostasis was seen on the back of the deceased.

[12] On external examination, marks of trauma were expressly noted viz:

> Central aspect of the neck, slash wound, 13.0 x 7.5cm, exposing totally transected trachea, oesophagus, both sides of the sternocleidomastoid muscle, both carotid arteries and jugular veins as well as the corresponding nerves. There was an incise wound on the body of the third cervical spine, 1.0cm in length. There was another incise wound on the body of the fourth cervical spine, 2.5cm in length.

[13] Internal examination reveals, inter alia:

1 Neck

The carotid arteries on both sides were totally transected. The thyroid gland showed total transection of the lower poles. The thyroid cartilage was transected at the body. The cervical spines showed injuries as described above.

2 Thorax

Both lungs had collapsed.

[14] SP2 concluded that the cause of death was slash wound on the neck which was inflicted with considerable force by means of heavy and sharp objects such as parang or scythe (sabit).

[15] There was no cross-examination by the defence in relation to SP2's findings, except that in answer to a defence question, SP2 was unable to say when exactly the deceased's body was brought to the hospital.

[16] I find on the evidence that this second element, ie injuries inflicted on the deceased has been established by the prosecution.

WHO CAUSED THE DECEASED'S DEATH?

[17] The evidence in chief of SP1 who is the grandmother of the accused Chong Chai revealed that the accused had caused the death of the deceased. The material part of SP1's evidence is reproduced below:

S: Apakah punca Mah mati?

J: Punca disebabkan oleh anaknya.

S: Siapa nama anaknya?

J: Chong Chai

S: Makcik kenal Chong Chai?

J: Ya, dia cucu saya.

S: Adakah Chong Chai dalam mahkamah ini?

J: Ada, (tunjuk kepada Orang Kena Tuduh dalam kandang Orang Kena Tuduh)

[My translation:

Q: What was the cause of Mah's death?

A: It was caused by her son.

Q: What is the name of her son?

A: Chong Chai.

Q: Do you know Chong Chai?

A: Yes, he is my grandson.

Q: Is Chong Chai in this court?

A: Yes (points to the accused in the dock)]

[18] SP1 elaborated that on 4 July 2003 at about 9pm, she was in her house where the accused behaved like mad ('gila'), by which she meant the accused has lost his senses, was shouting and was trance-like. The accused's siblings were also in the house, situated in Kampung Orang Asli, Bukit Seraya, Jasin Melaka ('the house').

[19] SP1's evidence unfolded that the accused had directed the deceased and SP1 to hold his body and his legs. The accused told SP1 that he (the accused) has been possessed by 'Datuk'. The accused then behaved violently, thereby causing Mah and SP1 to fall into a drain, face upwards. Mah cried and shouted in pain. Subsequently, the accused dragged Mah into the house, made her lie down in front of the main door before pulling Mah into the centre of the house to sprinkle water on Mah who did not respond although still conscious. The accused slapped Mah until she was rendered unconscious.

[20] SP1 testified that the next morning, on 5 July 2003, the accused brought Mah out of the hosue and pressed her to find out if she was suffering from any pain. He then asked his brother Rosni to bathe Mah in the bathroom and bring her back to a room in the house so as to put her to sleep. At 3pm, the accused brought her from the room and made her lie down on the cement floor in the hall. The accused slapped her in the face and body, before leaving her alone. The accused would not allow others to approach her. Mah remained quiet. At 6.30pm, the accused brought her to the front portion of the house where he tried to put her upright but she collapsed. The accused then entered the house, took a parang from the house, saying that he wanted to cut open Mah's neck to ascertain Mah's disease, adding that Mah would revive three days later. Other members of the family were in the house, apparantly dumbfounded. SP1 was frightened. The accused then closed all the windows.

[21] When other members of the family were in the house, SP1 heard the sound of the accused dragging Mah around the house. Both the accused and Mah were

A outside the house until 8pm when SP1 heard the accused asking his brothers Johari, Aki and Rusli to dig a hole to bury Mah while the accused kept watch.

[22] SP1 would have become a victim of the accused if she had not escaped from the accused and hidden herself in the bushes until the next morning, when she
B proceeded to one Ah Huat's house and requested the lodging of a police report. The report was lodged by one Ee Quik Mee SP5 vide Selandar Report No 171/2003, which was received by SPG corporal Nor Azmin on 6 July 2003 at about 7am.

[23] SPl's evidence in chief remained substantially unscathed after defence
C cross-examination.

[24] On 6 July 2003, at about 8.50am, police photographer SP3 Mohd Azis took 18 photographs in the presence of ASP Mazlan (SP8) and his investigation team at the scene of the crime. On 7 July 2003, at about 2.30pm, he took 10 photographs
D at the mortuary of the Melaka Hospital, also in the presence of SP8.

[25] SP4, Roslee bin Ahat, the accused's uncle, testified that on 5 July 2003, at 10am after looking for durians in Kg. Bukit Seraya, he went to SP1's house where he saw a group of family members, with Mah being treated by the accused,
E apparently through exorcism in the house. SP4 was not aware of Mah's disease. At about 6.30pm, the accused brought Mah out of the house and SP4 heard dragging sounds around the house. SP4 saw the accused holding a parang which SP4 identified. The accused told SP4 that Mah was dead and asked SP4 to take a changkul, pongkis, scoop and perjang, all of which SP4 sourced from his own house
F about 100m away. The accused then came out of the house and identified a place in order to dig a grave for the deceased. He ordered a group of six family members including SP4 to dig the grave in front of the house, which they did while the accused kept watch. The deceased, who was lying about six feet next to the grave, was subsequently buried, as ordered by the accused who then asked all of them to return
G to the house. Cross-examination of SP4 did not alter the substance of his evidence in chief.

[26] Together with a police party, SP6 proceeded to the scene at about 8.05am and found what appeared to be a grave in front of the house. In the house, he saw six Orang Asli including the accused who was holding two parangs. SP6 kept watch as
H instructed by the investigating officer ASP Mazlan SP8 who arrived subsequently.

[27] Meanwhile, on 6 July 2003 at 8am, SP7 detective corporal Mohd Ali of the Jasin police district headquarters received information in connection with the report. Together with detective lance corporal Malek, SP7 proceeded to the scene by means
I of a police land rover. At the scene, SP7 saw, inter alia, the accused in a trance and holding two parangs, one in each hand. SP7 also met other police personnel from the Selandar police station. With the help of SP6 and detective lance corporal Malek, SP7 arrested and handcuffed the accused. SP7 also found two changkuls, one scoop and two digging appliances.

[28] Upon arrival at the scene half an hour later, ASP Mazlan SP8 instructed SP6, SP7 and one detective corporal Zainal to unearth the grave by means of the aforesaid changkuls, scoop and digging appliances. After digging about two feet deep, they discovered the body of a female Orang Asli whose hands were on her stomach. A

[29] SP8 recovered two changkuls, one scoop, two digging appliances and two parangs. He examined the body and found slash wound on the neck of the deceased whom he identified as Mah binti Bentong. B

[30] SP8 directed his men viz corporal Ramli and corporal Samy to look after the body. Together with police photographer SP3, SP8 entered the house and saw huge traces of blood in the dining room and the front right portion of the house. He prepared a sketch plan of the house and the surrounding area, including the accused's bedroom and the deceased's grave. C

[31] SP8 instructed his men to bring the accused and eight other Orang Asli, together with the aforesaid appliances to Selandar police station. D

[32] On 6 July 2003 at about 12 noon, together with detective lance corporals Zainal and Malek, SP8 brought the deceased's body to the Melaka Hospital and handed it over to the hospital mortuary staff one SA Azlan for post-mortem by SP2. After the post-mortem, the deceased was handed over to her brother Udin. E

[33] Cross-examination of SP8 confirmed that upon his arrival at the scene, he saw the people seated in a circle, near the grave. In addition to all the above appliances, he also recovered two baskets and a tray. Learned defence counsel Mr Hillary D'Cruz, assisted by Mr Khairil Aznan bin Azizi and Miss Shamini Devi Dorasamy submitted that the court has to consider the totality of the prosecution evidence in order to determine the element of actus reus in ss 299 and 300 read together. F

[34] Learned deputy public prosecutors Miss Roziza binti Sidek, assisted by Miss Shazreen bte Mohd Hatta argued that the accused's actus reus has been established. G

[35] In my judgment, it is pertinent to reiterate that the defence had not mounted any serious challenge in the course of cross-examination in relation to the relevant material evidence of the aforesaid prosecution witnesses. H

[36] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212at p 213, Raja Azlan Shah CJ (Malaya) (now HRH Sultan of Perak) held, inter alia, that: I

> … failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony. On this point, we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony.

A **[37]** The eminent learned Chief Judge also referred to the exceptions stated in the judgment of the Supreme Court of *New Zealand in Transport Ministry v Garry* [1973] 1 NZLR 120, at p 122 but those exceptions do not appear to have any application here.

B **[38]** In the instant case, I hereby follow and apply the general rule as enunciated above. The relevant material evidence of the aforesaid prosecution witnesses is credible and remains unshaken. I am of the view that the prosecution has proved that the accused has caused the injuries which resulted in the death of the deceased.

C INTENTION

[39] It was the defence contention that the prosecution has failed to prove that an act was perpetrated by the accused with the necessary mens rea, ie intention or knowledge to cause the death of the deceased.

D

[40] The prosecution argued that accused's intention under s 300 has been established at this stage.

[41] In my judgment, mens rea in the sense of intention or knowledge being a **E** mental element and a question of fact is not capable of being established by way of direct evidence: Wing Commander Briggs in Re Eric Woodford [1946] 2 MLJ 19 at p 21. It has to be gathered from indirect evidence by reference to all the facts and circumstances prevailing in each particular case. In this regard, the accused's intention of causing bodily injury to the deceased may be gathered from the accused's act in **F** particular and the entire evidence adduced for the prosecution in general.

[42] The duty of a judge in this regard had been explained by Thomson CJ (later LP) in *Tan Buck Tee v Public Prosecutor* [1961] MLJ 176 (CA) at pp 178–179 in the following words:

G

> In all cases of homicide the question of the intention of the accused person in doing the act which is the cause of death, supposing such act is made out by the evidence, is of fundamental importance. In all cases that intention is something the existence and the nature of which are to be deduced from the evidence. In some cases the evidence may be such that it becomes necessary to consider with very great care whether or not the intention **H** with which the act was done does or does not come within the definition of criminal intention set out in s 299 of the Code as being necessary to make the act out to be culpable homicide and whether it does or does not come within the definition of criminal intention set out in s 300 as being necessary to make the act out to be murder. In such cases it is necessary for the judge to spell out with the greatest possible care such portions of ss 299 and 300 as may be appropriate.

I

[43] Although the learned Chief Justice was delivering the judgment of the then Court of Appeal in an appeal from a decision in a trial by a judge and jury, the above observation is in my view equally applicable to a trial before a judge sitting alone, as in the case before me.

[44] I am mindful of the evidence of the forensic expert SP2, in particular her finding that the cause of death was slash wound on the neck as a consequence of the infliction of considerable force by means of a sharp and heavy weapon such as a parang or a scythe (sabit) and the severity and extent of the injuries inflicted on the deceased which had been comprehensively dealt with by SP2 in the external and internal examinations of the deceased as alluded to above.

[45] Further, SP1's testimony that the accused had intended to cut open the neck of the deceased by means of a parang taken from the house in order to ascertain the disease of the deceased, so that the deceased could recover three days thereafter is clear and positive evidence that the accused's acts were done with the intention of causing death under s 300(a).

[46] In the circumstances, I am unable to sustain the defence contention that the prosecution has failed prima facie to prove the accused's intention.

IDENTITY OF DECEASED

[47] The defence submitted that when SP2 conducted the post-mortem at 2.30pm on 7 July 2003, SP8 did not specifically mention that he had identified the deceased's body to SP2. Reference was made to *Fazal Din v Public Prosecutor* [1949] MLJ 123 (CA).

[48] It was argued for the prosecution that the identity of the deceased had not been disputed at all. Reliance was placed on *Wong Swee Chin*.

[49] I shall first consider *Fazal Din*. There, the medical officer who conducted the post-mortem testified that a police constable had identified the deceased but the constable was not called to give evidence. Willan CJ in delivering judgment of the then Court of Appeal held that the evidence of the medical officer pertaining to the identification for post-mortem was hearsay and inadmissible, in which case there was no evidence of identity.

[50] In my judgment, the factual matrix before the then Court of Appeal and that before me are remarkably different in that SP8, the investigating officer had testified that he saw the body of the deceased at the scene and had, together with the deceased's brother Udin and the police photographer SP3, positively identified the deceased at the mortuary to SP2 for purposes of post-mortem.

[51] Identification is a question of fact which may be established at the trial on the basis of the evidence adduced. In this regard, I am of the view that SP8 has given credible and cogent evidence from which I make a specific finding of fact i.e. that he together with the police photographer SP3 and the deceased's brother Udin had positively identified the deceased to SP2 for purposes of post-mortem. This is particularly so when SP8's evidence on this crucial issue had not been cross-examined, thereby amounting to an acceptance of SPS's evidence by the

defence: Wong Swee Chin. In the circumstances, I am unable to sustain the defence contention herein.

SKETCH PLAN

[52] It was submitted for the defence that there are significant gaps in the sketch plan exh PI2 in relation to the place where Seng Kee Moi was stabbed with traces of blood and the place where Seng Kee Moi was lying. *Rex v Ling Kang Chui* [1949] MLJ 211 (CA) was cited in support.

[53] The prosecution contended that this issue is not material and that the sketch plan was tendered to assist the court in understanding the scene and its surrounding area.

[54] I shall very quickly deal with the issue of relevancy. I am of the view that the issue as to the traces of blood and the place where Seng Kee Moi was lying was neither relevant nor material to the charge under consideration.

[55] Next, my analysis of the judgment of the then Court of Appeal in *Lim Kang Chui*, relied on by the defence, reveals that it was a case which was referred to the Court of Appeal by a district judge in relation to the use of plans in criminal cases. Murray Aynsley CJ explained at pp 211 and 212 that the point was academic as there was in any case ample evidence on which the accused could be convicted and the conviction ought to stand. The learned Chief Justice however gave the following guidelines:

(1) A plan produced as evidence should only show features that are visible to the person making the plan, without putting in additional features from hearsay; and

(2) A key is unobjectionable if it assists identification of features properly on the plan, but not anything in addition.

[56] By way of comparison and contrast, in the instant case, upon a careful consideration of the sketch plan exh P12, I am unable to find any gaps in the sketch plan. On the contrary, it portrays the respective position of the persons, objects and articles found at the scene and the surrouding area. The plan and the key are in fact completely consistent with the direction given in *Ling Kang Chui*.

CHEMIST REPORT

[57] The defence argued that there was a large pool of blood and the prosecution must show whether it had any connection with the accused or any other person and the mere fact of making the chemist available to the defence would not enable the prosecution to fill in the gap. *Chah Siew Kok v Public Prosecution* [1987] 1 CLJ 386 (HC); and *Ooi Lean Chai v Public Prosecutor* [1991] 2 MLJ 552 (SC) was cited in support.

[58] In response, the prosecution's contention is that the eight witnesses called by the prosecution have given sufficient evidence to bring about a prima facie case, on the basis of *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105.

[59] In considering *Chah Siew Kok*, cited for the defence, I find that it concerns an appeal against conviction and sentence imposed by a magistrate under the Trade Description Act 1972. The prosecution had served a copy of the chemist report on the appellant 10 days before the commencement of the trial. The defence gave notice to the prosecution, not less than three days before the commencement of the trial, for the calling of the chemist as a witness. Although the chemist was not called, the chemist report was admitted as evidence. On appeal, Peh Swee Chin J (later FCJ) held that the chemist report was admitted in contravention of s 399 of the Criminal Procedure Code which imposes a duty on the prosecution to call the chemist as a witness. Hence, the conviction and sentence were set aside.

[60] However, the facts before me are readily distinguishable in that the prosecution did not seek to tender the chemist report. The defence had neither served any notice on the prosecution requiring the calling of the chemist as a witness under s 399 of the CPC nor called the chemist made available to the defence. Hence, I am of the view that *Chah Siew Kok*, is unhelpful to the defence.

[61] In *Ooi Lean Chai*, also relied on by the defence, the accused had originally been convicted of trafficking in heroin and 6-monoacetylmorphine. The chemist report duly served on the accused had incorrectly stated that the 6-monoacetylmorphine was a dangerous drug when in fact it was not so listed at that time. The Supreme Court ordered a retrial. At the retrial, the accused was charged only with trafficking in heroin and the prosecution relied on the same chemist report, although it has not been re-served on the accused. The chemist was not called to give evidence thereat. The accused was convicted. His appeal was allowed and the conviction was quashed by the then Supreme Court, holding that the retrial is a new or fresh trial in which the chemist report must be re-served under s 399(i) of the Criminal Procedure Code, otherwise it cannot be admitted without calling the chemist to produce it. In the absence of the chemist report, there was no evidence before the court that the subject matter was heroin within s 2 of the Dangerous Drugs Act 1952.

[62] In the instant case, as the prosecution has not sought to admit the chemist report, I am of the view that *Ooi Lean Chai,* is unsupportive of the defence contention. In my judgment, the calling of witnesses for the avowed purpose of establishing a prima facie case at the close of the prosecution's case is a matter which is embarked upon by way of an exercise of prosecutorial discretion. This proposition has been stated by Thomson CJ (later LP) in *Khoon Chye Hin*, at p 109, in the following words:

> It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness when he does not believe to be a witness of truth.

[63] The court will not interfere with the exercise of that prosecutorial discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive: per Lord Thankerton in *Adel Muhammed El Dabbah v AG for Palestine* [1944] AC 156, at p 168, which was followed by Thomson CJ.

[64] The defence contention herein had never adverted to the existence of a wrong or oblique motive on the part of the prosecution in not calling the chemist as a prosecution witness. As the prosecution has made the chemist available to the defence, I am unable to see any impropriety on the part of the prosecution, expecially when s 134 of the Evidence Act 1950 specifically provides as follows:

> 134. Number of witness No particular number of witness shall in any case be required for the proof of any fact.

[65] In the circumstances, I am unable to see any merit in the defence contention.

DOUBTS IN PROSECUTION'S CASE

[66] The defence subscribed to the view that there are doubts in the prosecution's case as evidence is incomplete and there are jigsaw puzzles consistent with the accused's innocence. The following cases were referred to:

(1) *In Re Eric Woodford* [1946] MLJ 19 BMA, Superior Court;

(2) *Sia Soon Swan v Public Prosecutor* [1966] 1 MLJ 116 (PC);

(3) *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC); and

(4) *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (PC).

[67] The prosecution submitted that defence should be called.

[68] In my judgment, an analysis of the authorities cited for the defence will determine the strength or otherwise of the defence contention.

In Re Eric Woodford, the accused was charged under s 3 of the War Offences Ordinance 1941 in which the prosecution must prove that the accused's act was done with intent to help the enemy and was designed or likely either to give assistance to the military operations of the enemy or to endanger human life. The facts were equally consistent with guilt or innocence of the accused. The Superior Court of the then British Military Administration held that the duty of the court was to assume that the accused was innocent and so defence should not be called.

[69] In *Sia Soon Suan*, the accused was charged with and convicted on the offence of having without lawful excuse hand grenades and ammunition in the security area as proclaimed by the Yang di Pertuan Agong under s 57(1)(b) of the Internal Security Act 1960. Not one jot of evidence was produced by the prosecution to support the evidence of PW4 that the hand grenades and ammunition were in fact handed in at Pontian Police Station. In allowing the appeal and quashing the conviction, Ong Hock Thye AGCJ (Malaya) (later CJ (Malaya)) held that 'the requirements of

strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of the accused, its decision must be based on the evidence adduced and nothing else'.

Abdullah Zawawi, concerns a conviction on a charge of criminal breach of trust under s. 409 of the Penal Code. The accused was the former manager of a FELDA Scheme. He personally kept and maintained cash books and personally went to the bank to withdraw money. He held the key to the safe where cash was being kept. There was a shortage of RM23,905.87 in the safe. For some time, the safe key was in the hands of the assistant manager when the accused attended a course at Universiti Pertanian. The assistant manager went to the office building on the night when the safe was broken into. The safe could be opened by a duplicate key. It was unclear whether the office boy bolted the windows that evening after the accused and the assistant manager left. The assistant manager and the office boy were not called as prosecution witnesses. Upon a reference to the Supreme Court, the question was:

> Although the prosecution has the right not to call every witness from whom a police statement has been taken, the question is how far does the right extend?

[70] Salleh Abas LP (as he then was) in delivering judgment of the then Supreme Court held that the prosecution's right not to call a witness must always be guided by its duty to discharge the onus of proof and that the assistant manager and the office boy should be called as prosecution witnesses to explain gaps in the prosecution evidence as the court could not be sure and should not indulge in conjectures and probabilities.

[71] Finally, in *Ti Chuee Hiang*, the appellant was charged with trafficking heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952. The police had used an informer who enticed the appellant to walk into a trap which the police had pre-set. At the trial, the prosecution did not call the informer nor was he offered to the defence as a witness. Appellant was convicted and sentenced to death. On appeal, it was argued for the appellant and upheld by the Federal Court through the judgment of Edgar Joseph Jr FCJ (as he then was) that the informer was not only an informer but was an agent provocateur, and the failure to call him had occasioned a serious miscarriage of justice.

[72] Having regard to the authorities cited for the defence, and upon a maximum evaluation of the entire evidence adduced at the close of the prosecution's case, it needs to be noted that the question before me is whether there is any gap in the prosecution's case which results in the failure to establish a prima facie case? In the light of the above finding of facts, I am unable to find any such gap.

PRIMA FACIE CASE

[73] The procedure after conclusion of the prosecution's case is contained in s 180(i), (ii) and (iii) of the Criminal Procedure Code ('CPC') which reads as follows:

180 Procedure after conclusion of case for prosecution

(i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(ii) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(iii) If the Court finds that a prime facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[74] After the above maximum evaluation at the close of the prosecution's case, I find that the prosecution has established a prima facie case for the accused to answer. Pursuant to s 180(i) and (iii) of the CPC, as explained by the Court of Appeal in *Looi Kow Chai*, I call upon the accused to enter on his defence.

ACCUSED REMAINING SILENT

[75] After the three alternatives had been explained to the accused and after a mature consideration of adequate legal advice, the accused elected to remain silent. The defence however called a psychiatrist SD1 as the sole defence witness, whose evidence will be given due consideration, which I shall advert to later in this judgment.

[76] For the moment, the defence submitted that the court should reconsider the totality of evidence, adding that a case of murder has not been proved by the prosecution.

[77] On the other hand, the prosecution urged the court to apply s 182A of the CPC.

[78] I shall first consider the accused's election to remain silent. In my view, the legal effect of the accused electing to remain silent is that he has not rebutted the prima facie case established by the prosecution, in which case, but for the evidence of SD1, applying s 182A(1), as explained in *Looi Kow Chai*, the result would have been that the prosecution has proved its case beyond reasonable doubt. This result is also consistent with *Balachandran*, in which the Federal Court stressed that where the accused remains silent, there will be no necessity to re-evaluate the evidence in order to determine whether there is reasonable doubt, in the absence of any further evidence for such consideration and that the prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[79] In addition, the clear guideline given by the Federal Court in *Mohd Radzi*, at p 211 para 8 is that after the defence is called and the accused elects to remain silent, then the court must convict. This would have been the case had the accused called no other witness nor adduced other evidence in rebuttal.

[80] However, as stated above, the evidence of the sole defence witness, ie the psychiatrist would merit my consideration.

UNSOUNDNESS OF MIND

[81] SD1, Dr Khairuddin bin Abdul Wahab is a specialist psychiatrist attached to Hospital Permai Johor Bahru. He holds two degrees viz a medical doctor's degree and a degree in psychiatry, both from Universiti Kebangsaan Malaysia. He has been practising the speciality of psychiatry for nine years, during which he has given evidence in court and his evidence has been accepted.

[82] The accused was admitted to Hospital Permai for the period from 21 July 2003 to 18 December 2003 and has since been under intensive observation and examination by this witness who has also made inquiries from the accused's siblings and other members of the accused's family. This witness found that the accused had been suffering from delusional disorder one month before the ill-fated day on 5 July 2003. The accused's delusional disorder was a kind of superstitious delusion which led the accused to believe that he had supernatural mystical powers capable of curing diseases and healing patients drawn from the Orang Asli community. After intensive observation, examination and inquiries, he concluded that the accused was mentally unsound and was not aware at the material time of the commission of the offence that whatever he was alleged to have done was against the law, as the accused was at the material time in possession of the four criteria to constitute the delusion viz a fixed belief, an unshakeable belief, a false belief and out of keeping of the norm and culture of his own community or society.

[83] On that evidence, the defence took the position of having discharged the burden of proving on a balance of probabilities that by reason of the delusional disorder there was no mens rea on the part of the accused, relying on s 84; as well as ss 347 and 348 of the CPC, *Public Prosecutor v Jong Chin Chin* [1995] 4 MLJ 300 (HC); *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495 (HC); *Public Prosecutor v Ismail bin Ibrahim* [1998] 3 MLJ 243 (HC); *Public Prosecutor v Haji Sudin bin Sube* [1994] 2 CLJ 437 (HC); and *Juraimi Husin v Public Prosecutor* [1998] 1 MLJ 537 (refd) (CA).

[84] The prosecution shared almost the same sentiment and in addition cited s 105 of the Evidence Act 1950; and *Public Prosecutor v Nageswari* [1994] 3 MLJ 463 (HC).

[85] At the close of the trial now, it is essential for me to invoke s 182A of the CPC which reads:

> 182A. Procedure at the conclusion of the trial.
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[86] In my judgment, the defence evidence would attract the application of s 84 which states:

84. Act of a person of unsound mind.

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[87] Section 84 is the statutory formulation of the *English M'Naghten Rules* [1843] 10 Cl & F 200 HL on legal insanity. That being the case, I shall refer to the expressions 'unsoundness of mind' and 'insanity' interchangeably (see also *Mallal's Criminal Procedure* (5th Ed) MLJ p 5367 para 11351).

[88] Section 84 is also harking back to first principles in criminal law which found expression in the Latin maxim *actus non facit reum nisi mens sit rea*. (An act does not make a man guilty unless his mind be guilty). In other words, the wrongful act and the guilty mind must concur to constitute the crime.

[89] It is trite law that there is a rebuttable presumption of sanity in favour of everyone, in that every person is sane and possesses a sufficient degree of reason to be responsible for his or her crime until the contrary is proved and the onus of proving insanity is on the accused: s 105 of the Evidence Act 1950; *Jong Chin Chin* per Richard Malanjum (now FCJ), following *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63; *Misbah bin Saat* per Visu Sinnaduraji J (as he then was); *Ismail Ibrahim* per Augustine Paul JC (now FCJ); *Haji Sudin bin Sube* per Ian Chin J; and *Juraimi Husin* per Gopal Sri Ram JCA who delivered judgment for the Court of Appeal, following *Public Prosecutor v Alang Mat Nasir bin Anjang Talib; Public Prosecutor v Chen Lip* [1938] MLJ 153; and *Jusoh v Public Prosecutor* [1963] MLJ 84.

[90] In the absence of any rebuttal evidence by the prosecution, I accept SD1's evidence as an expert under s 45 of the Evidence Act 1950 and find that the accused has established on a balance of probabilities the defence of unsoundness of mind under s 84 in that at the time of committing the act of causing the injuries which resulted in the death of the deceased, he was by reason of unsoundness of mind, incapable of knowing the nature of the act and hence the accused's act has fallen short of the offence contained in the charge. The accused is therefore to be acquitted by reason thereof.

[91] That being the case, I must invoke s 347 of the CPC which reads:

347. Judgment of acquittal on ground of mental disorder.

Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

[92] Pursuant to s 347 of the CPC, upon a maximum evaluation of the entire evidence adduced at this trial, it is my specific finding that the accused did commit the act with which the accused has been charged.

[93] That leads me to the consideration of s 348(i) of the CPC in the following words:

> 348. Safe custody of person acquitted.
>
> Whenever the finding states that the accused person committed the act alleged, the Court before which the trial has been held shall, if that act would, but for incapacity found, have constituted an offence, order that person to be kept in safe custody in such place and manner as the Court thinks fit and shall report the case for the orders of the Ruler of the State in which the trial is held:
>
> Provided that…

[94] Section 348(i) of the CPC requires me to order that the accused be kept in safe custody in such place and manner as this court thinks fit and to report to the Ruler of the State, which shall be construed as TYT Yang di-Pertua Negeri of Melaka: see para 2(ii) of the CPC (Amendment) Act 1976 (Act A365/76).

[95] The intention and wisdom expressed by Parliament in s 348(i) of the CPC is not punitive but protective and rehabilitative, both to the society and the accused, in the sense that society must be protected from the act or acts of a mentally unsound person who in turn is in need of treatment for his own good. The custody is therefore not construed as a punishment (see also the judgment of Augustine Paul JC (now FCJ) in *Ismail Ibrahim*).

VERDICT

[96] On the foregoing grounds, I find the accused not guilty of the offence as charged by reason of his unsoundness of mind as contained in s 84. He is therefore acquitted under s 347 of the CPC, under which I specifically find that he did commit the act in question. Pursuant to s 348(i) of the CPC, I order that the accused be kept in safe custody in the Sg Buluh prison and I shall report the orders herein to TYT Yang di-Pertua Negeri Melaka so that an order may be made by TYT pursuant to s 348(ii) thereof which reads:

> (2) The Ruler may order that person to be confined in a psychiatric hospital during the pleasure of the Ruler of the State.

Accused acquitted.

Reported by Loo Lai Mee